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No. 96-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

R.R. DONNELLEY & SONS COMPANY,
Petitioner,

v.

LAWRENCE H. FUCHS, Executive Director of the Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

REPLY OF PETITIONER

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REPLY OF PETITIONER

Respondents concede that the Florida tax scheme at issue here is presumptively unconstitutional under this Court's First Amendment authorities provided that it "singl[es] out the press" for unfavorable treatment. Respondents' Brief in Opposition ["Opp."] 12-13 (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)). Respondents also concede that this tax scheme categorically denies printing and publishing firms a tax exemption on purchases of capital equipment for new or expanding facilities — a tax exemption that is available to most, if not all, other manufacturers that purchase capital equipment for new or expanding facilities. Opp. 8, 14-15.

Respondents, like the court below, differ with petitioner on only one critical issue: whether a state may insulate a tax that

discriminates against the press from First Amendment scrutiny, under *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983), by the simple expedient of also applying the tax to at least one other category of businesses. Respondents do not dispute that, as the court below recognized (Pet. App. 6a), this issue has never been addressed by this Court. Nor do they offer any reason why this issue is not an important one for clarifying the reach of *Minneapolis Star*.

1. Respondents attempt to refute that the tax scheme "singles out" the press by arguing (i) that the tax exemption is available only to firms that buy capital equipment to start or expand a business, and not to firms that buy capital equipment for other purposes or to firms that buy non-capital equipment (Opp. 13-14), and (ii) that the exception to the tax exemption contained in Fla. Stat. § 212.08(5)(b)5 applies, by its terms, to restaurants, electric utilities, and mining companies, as well as to printing and publishing firms (Opp. 14, 18).

The first point is of no relevance whatsoever. The tax statute is discriminatory because printing and publishing firms, alone among manufacturers, are categorically denied the tax exemption in *all* circumstances. All other manufacturers are entitled to the tax exemption provided that their equipment purchases satisfy the statutory criteria (*e.g.*, that the equipment is for starting or expanding a business). The mere fact that the tax exemption is limited to purchases of particular equipment for particular uses does not justifying denying the tax exemption to the press.

The second point, while technically correct if one looks only to the words of § 212.08(5)(b)5, does not accurately describe the actual application of the overall tax scheme. As respondents' designated witness acknowledged below, although several categories of businesses are listed in § 212.08(5)(b)5, the only categories actually affected by this provision are printing firms and restaurants. *See* Pet. 5-6 & n.3. Respondents do not appear to dispute the testimony of their designated witness as to how narrowly § 212.08(5)(b)5 applies in the real world. Moreover,

in holding that § 212.08(5)(b)5 does not "single out" the press, the court below relied solely on the fact, undisputed by the parties, that restaurants, as well as printing and publishing firms, are denied the tax exemption.

2. Respondents do not dispute that, as petitioner previously explained (Pet. 9-10), the tax schemes challenged in *Minneapolis Star* and *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991), like the tax scheme here, treated the press similarly to many other businesses (*e.g.*, service businesses). Accordingly, this case cannot, as respondents suggest, be distinguished from *Minneapolis Star* and *Globe Newspaper* on the ground that printers are being treated no differently than restaurants.

3. In any event, respondents fail to offer *any* reason why printing firms should be classified with restaurants — and differently from all manufacturing firms — for purposes of entitlement to the tax exemption at issue. They merely continue to suggest, as they and the court of appeal did below, that the discriminatory tax treatment of printers was motivated by legislative concerns about automation. *See* Opp. 20-21; *see also* Pet. App. 8a. They do not suggest, however, that this rationale applies to restaurants. Nor could they legitimately do so.

As petitioner previously explained, in determining whether a tax is discriminatory, the Court typically considers whether the tax falls evenhandedly on all members "of the same 'class.'" *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 343 (1989); *see* Pet. 10-11. It is irrelevant whether two taxpayers are treated similarly if they are members of different "classes." Here, given that no justification has been, or could be, offered for including printing firms and restaurants in a "class" by themselves for purposes of taxation of their capital equipment purchases, the inclusion of restaurants cannot solve the constitutional problem. The tax is thus virtually identical to the one invalidated on First Amendment grounds in *Globe Newspaper*, 571 N.E.2d at 619-20, which denied the press, but no other manufacturers, a tax exemption on new equipment purchases.

4. Respondents perceive this case to be controlled by *Leathers v. Medlock*. *See* Opp. 12. But *Leathers* has no application to this case. In *Leathers*, the Court was concerned not with a tax that discriminated *against* the press vis-a-vis other taxpayers, but rather with a tax that discriminated *among* members of the press. The Court explained that such a tax, in contrast to the tax in *Minneapolis Star*, "does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity." 499 U.S. at 447. The tax scheme at issue here is like the one in *Minneapolis Star* and unlike the one in *Leathers*: it denies to *all* printing and publishing firms a tax exemption that is available to *all* other manufacturers. This is precisely the sort of "differential taxation of the press" that, as the Court recognized in *Minneapolis Star*, places an impermissible "burden on the interests protected by the First Amendment." 460 U.S. at 585.

5. Respondents assert that "[t]here is *no proof* that there is any invidious reason for printers not receiving the exemption." Opp. 6, 18; *see also* Opp. 10-11 (attempting to distinguish *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)). But no such proof is necessary. As this Court observed in *Minneapolis Star*, "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." 460 U.S. at 592; *see also Leathers*, 499 U.S. at 445 (recognizing that "*Minneapolis Star* resolved any doubts" on this score).

6. Respondents also repeatedly observe that § 212.08(5)(b)5 is not content-based. *See* Opp. 6, 8, 13, 16, 18. But neither was the tax at issue in *Minneapolis Star*. As this Court has made clear, discrimination based on content is a sufficient, but not a necessary, condition for invalidating a tax statute under *Minneapolis Star* and its progeny. *See Leathers*, 499 U.S. at 447.

7. Respondents acknowledge that this case is not mooted by the recent amendment to § 212.08(5)(b)5, which prospectively allows printing firms and some publishing firms to qualify for the tax exemption. *See* Opp. 6. The amendment, which became effective on July 1, 1996, has no retroactive application to this

case, which involves a nearly two million dollar tax on petitioner's purchases of equipment in 1990 and 1993. The tax exemption continues to be denied, moreover, to "publishing firms that do not export at least 50 percent of their finished product out of the state." Fla. Stat. Ann. § 212.08(5)(b)5. The Court has, of course, frequently granted certiorari to consider important constitutional challenges to state statutes, including tax statutes, that have since been amended or even, in contrast to the statute here, entirely repealed. *See, e.g., Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 852 n.1 (1996); *Baldwin v. Alabama*, 472 U.S. 372, 373 n.1 (1985); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 580-81 (1979).

9. As the briefs of *amici* Newspaper Association of America, Printing Industries of America, and Printing Association of Florida confirm, the petition presents an issue of considerable importance in clarifying the First Amendment protection that the press is entitled to under the first prong of *Minneapolis Star*. Respondents have offered no reason why this issue is not so significant as to merit the Court's attention in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 12, 1996